[Cite as *Fuller v. Allstate Ins. Co.*, 2012-Ohio-3705.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Clottee Fuller et al.,	:	
Plaintiffs-Appellants,	:	
		No. 11AP-1014
v.	:	(C.P.C. No. 10CVC-11-17068)
Allstate Insurance Company,	:	(ACCELERATED CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on August 16, 2012

Michael D. Christensen Law Offices, LLC, and *Chanda L. Higgins,* for appellants.

Hollern & Associates, and *Edwin J. Hollern*, for appellee.

APPEAL from the Franklin County Court of Common Pleas.

DORRIAN, J.

{¶ 1} Plaintiffs-appellants, Clottee Fuller ("Clottee") and Ra'Lysha Fuller ("Ra'Lysha") (collectively "appellants"), appeal from a judgment of the Franklin County Court of Common Pleas, in which the trial court granted summary judgment in favor of defendant-appellee, Allstate Insurance Company ("Allstate" or "appellee"). For the following reasons, we reverse.

{¶ 2} On December 31, 2009, Ronald Fuller ("Mr. Fuller") was driving his wife, Clottee, and his daughter, Ra'Lysha, in the family 2003 Kia Sedona. He stopped at a Speedway gas station at 5800 Cleveland Avenue, in Columbus, Ohio. Mr. Fuller parked his car next to a gas pump, then took his keys and went into the gas station to pay for gas, purchase coffee, and use the restroom while his wife and daughter waited in the car. While he was in the gas station, a red truck pulled around the corner of the gas pump and hit the driver's side of the Fullers' Kia Sedona. The driver of the truck then stopped the

truck at a nearby gas pump. Ra'Lysha exited the car at the same time that Mr. Fuller came out of the gas station. She went up to her father to tell him about the collision. Together, they approached the truck to exchange information with the driver. As they approached, the driver quickly fled the gas station in the red truck. No identifying information was obtained or provided by appellants.

{¶ 3} Appellants allege that, as a result of this incident, Clottee incurred hospital and medical expenses in the amount of $20,396.10, and Ra'Lysha incurred hospital and medical expenses in the amount of $4,467.50. Both appellants claim that they may incur additional medical expenses in the future as a result of the unknown driver's negligence.

{¶ 4} Appellants filed an insurance claim with Allstate to recover damages for personal injuries under the uninsured motorists coverage of their insurance policy. Allstate denied the claim, citing a lack of independent corroborative evidence as required by the policy. On November 19, 2010, appellants brought an action against Allstate for uninsured motorist benefits, and on August 26, 2011, they filed a motion for summary judgment. On September 8, 2011, appellee responded with a memorandum in opposition to appellants' motion for summary judgment and a cross-motion for summary judgment stating that appellants were not entitled to such benefits. On September 15, 2011, appellants filed their reply to appellee's memorandum contra and a memorandum in opposition to appellee's motion for summary judgment. On September 21, 2011, appellee filed its reply memorandum in support of its motion for summary judgment.

{¶ 5} On November 14, 2011, the trial court granted summary judgment in favor of appellee, finding that no evidence was proffered by appellants that is considered corroborative evidence as required by Allstate's policy and by R.C. 3927.18(B)(3) to collect for bodily injury of an insured pursuant to an "uninsured motorist" claim.

{¶ 6} Appellants appeal from the trial court's judgment, assigning the following error for this court's review:

> The trial court erred by granting summary judgment in favor of Defendant when the record presents genuine issues of material fact that demand resolution by the trier of fact.

{¶ 7} We review a summary judgment de novo. *White v. Westfall*, 183 Ohio App.3d 807, 810, 2009-Ohio-4490 (10th Dist.), citing *Koos v. Cent. Ohio Cellular, Inc.*, 94 Ohio App.3d 579, 588 (8th Dist.1994). When an appellate court reviews a trial court's

disposition of a summary judgment motion, it applies the same standard as the trial court and conducts an independent review, without deference to the trial court's determination. *Maust v. Bank One Columbus, N.A.*, 83 Ohio App.3d 103, 107 (1992); *Brown v. Scioto Cty. Bd. of Commrs.*, 87 Ohio App.3d 704, 711 (4th Dist.1993).

{¶ 8} Pursuant to Civ.R. 56(C), summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Accordingly, summary judgment is appropriate only under the following circumstances: (1) no genuine issue of material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) viewing the evidence most strongly in favor of the non-moving party, reasonable minds can come to but one conclusion, that conclusion being adverse to the non-moving party. *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66 (1978). Because summary judgment is a procedural device to terminate litigation, courts should award it cautiously after resolving all doubts in favor of the nonmoving party. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 358-59 (1992), citing *Norris v. Ohio Std. Oil Co.*, 70 Ohio St.2d 1, 2 (1982).

{¶ 9} On or about October 31, 2009, Clottee and her husband purchased an automobile policy from Allstate, with effective dates of October 31, 2009 to April 30, 2010. Included in the policy was uninsured motorists coverage for bodily injury. Their Allstate policy defined an "uninsured motor vehicle," in pertinent part, as:

> [A] hit-and-run motor vehicle which causes bodily injury to an insured person or an additional insured person. The identity of both the operator and the owner of the vehicle must be unknown; however, independent corroborative evidence must exist to prove that the bodily injury of the insured person or additional insured person was proximately caused by the negligence or intentional actions of the unidentified operator of the motor vehicle. The testimony of any insured person or additional insured person seeking recovery from us shall not constitute independent corroborative evidence unless the testimony is supported by additional evidence[.]

(Plaintiff's Exhibit 6, Allstate policy at 15.) The Allstate policy language adheres to R.C. 3937.18(B)(3), which sets forth conditions for "uninsured motorists" claims:

> The identity of the owner or operator cannot be determined, but independent corroborative evidence exists to prove that the bodily injury * * * of the insured was proximately caused by the negligence or intentional actions of the unidentified operator of the motor vehicle. For purposes [of this section], the testimony of any insured seeking recovery from the insurer shall not constitute independent corroborative evidence, unless the testimony is supported by additional evidence.

{¶ 10} The issue in this case is whether there is independent corroborative evidence separate from the testimonies of appellants. Specifically, we must determine whether Mr. Fuller's deposition and/or affidavit testimony constitutes independent corroborative evidence. This court finds that it does.

{¶ 11} In *Girgis v. State Farm Mut. Auto. Ins. Co.*, 75 Ohio St.3d 302 (1996), the Supreme Court of Ohio set forth the corroborative-evidence test. The *Girgis* test states that a "claim [may] go forward if there is independent third-party testimony that the negligence of an unidentified vehicle was a proximate cause of the accident." *Id.* at 303. While neither the Allstate policy nor R.C. 3937.18 specifically defines the term "independent corroborative evidence," this court has defined "corroborative evidence" as evidence that "supplements evidence that has already been given and which tends to strengthen or confirm it. It is additional evidence, or a different character, to the same point." *England v. Grange Mut. Cas. Co.*, 10th Dist. No. 97APE07-894 (Dec. 23, 1997). Further, we have found that corroborative evidence is "independent" if it comes from "another source." *Hassan v. Progressive Ins. Co.*, 142 Ohio App.3d 671, 675 (10th Dist.2001). In other words, the corroborative evidence is independent if it comes from a source other than the insured who is seeking coverage. Finally, there is no requirement in Allstate's policy, R.C. 3937.18, or *Girgis* that independent corroborative evidence needs to be eyewitness testimony. *England.*

{¶ 12} As it has been defined by this court, Mr. Fuller's testimony constitutes independent corroborative evidence. Mr. Fuller is an independent third-party because he is not a named party, nor is there evidence that he is an insured seeking recovery. He is another source. As an independent third-party, his testimony is corroborating evidence

because, although he was not an eyewitness to the accident, his testimony strengthens appellants' testimony that their vehicle was struck by an unidentified motorist. We reject appellee's argument that Mr. Fuller's statements are solely based upon the information relayed to him by appellants. In his deposition, Mr. Fuller testified:

> Q: Can you tell me what you remember about the incident?
>
> * * *
>
> A: I drove into a gas station and parked and – parked and took the keys and went into the gas station to pay for purchasing – to purchase the gas. While I was in there, I got some coffee, had to use the bathroom and stuff and what, and it took altogether 15 maybe, 20 minutes. And upon coming out, my daughter, she was telling me – you know, let me know – telling me that the car got hit.
>
> Q: Okay. Where on the – I'm assuming at that point you went and looked at the car?
>
> A: Yeah. It was on the driver's side front quarter panel.
>
> * * *
>
> Q: Prior to this incident, was there any damage to that part of your vehicle?
>
> A: No.
>
> * * *
>
> Q: Okay. You said you went into the store and you took the only keys with you?
>
> A: Yes.
>
> * * *
>
> Q: You had the only set of keys?
>
> A: Yes.

(Ronald Fuller depo., at 6-7, 9, 11.) Appellee's own attorney conceded in oral argument that this testimony qualifies as independent corroborative evidence:

> Q: Had [Mr. Fuller said that there was nothing wrong with the vehicle when he went into the restroom and when he came back it was smashed], wouldn't that be the independent corroboration [the appellants] need?
>
> A: I think so. I think if he was able to testify that [his] car was in perfect condition when [he] went in to the restroom, [and when he] came out, [although he] didn't see the impact, * * * there was a big dent on the front, and he's not making the claim, I think that would be [independent corroborative evidence]. I'd have to agree with you * * * [.]
>
> * * *
>
> A: Again, for example, if [Mr. Fuller] * * * had seen fresh property damage and that was his testimony, that would be admissible independent corroborative evidence[.]

(Apr. 26, 2012, 10:15 a.m. session oral arguments at 10:21:12 through 10:22:48.)

{¶ 13} There is no evidence that Mr. Fuller is seeking recovery from Allstate, and his testimony strengthens appellants' testimony that their car was struck by an unidentified motorist. Therefore, his testimony serves as independent corroborative evidence. When all the evidence is construed in appellants' favor for purposes of summary judgment, this independent corroborative evidence creates a genuine issue of material fact as to whether an unidentified driver's actions proximately caused the appellants' bodily injuries.

{¶ 14} We decline to discuss other issues raised, such as whether appellants could be independent, third-party witnesses for each other, as our determination regarding Mr. Fuller's testimony is dispositive.

{¶ 15} For the foregoing reasons, appellants' assignment of error is sustained. The judgment of the Franklin County Court of Common Pleas is reversed, and this cause is remanded to that court for further proceedings in accordance with law and consistent with this decision.

Judgment reversed; cause remanded.

BRYANT and TYACK, JJ., concur.

BRYANT, J. concurring.

{¶ 16} Given counsel's concession and the absence in the record of any indication that Ronald Fuller made any claim as a result of the December 31, 2009 incident at issue, I concur in the majority's determination that the judgment be reversed and the case remanded.

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